2-23-2015

Hunter v. State Respondent's Brief Dckt. 41992

IN THE SUPREME COURT OF THE STATE OF IDAHO

WYLIE G. HUNTER,	)	
	)	No. 41992
Petitioner-Appellant,	)	
	)	Kootenai Co. Case No.
vs.	)	CV-2012-4908
	)	
STATE OF IDAHO,	)	
	)	
Respondent.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

HONORABLE CARL B. KERRICK
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STATEMENT OF THE CASE

Nature Of The Case

Wylie G. Hunter appeals from the denial of his petition for post-conviction relief.

Statement Of The Facts And Course Of The Proceedings

Idaho State Police Detective Terry Morgan investigated Hunter for drug smuggling. (R., p. 248 (State v. Hunter, 2011 Unpublished Opinion No. 519, Docket No. 36728 (Idaho App., June 16 2011), attached as Appendix A).) Detective Morgan's information was that Hunter was using rental cars to drive from Coeur d'Alene to Canada, where he would pick up the marijuana, and then drive back. (R., p. 248.) The next time Hunter rented a car Detective Morgan waited for Hunter to return from Canada, and conducted a traffic stop. (R., p. 249.) The traffic stop was justified both by observed traffic violations and reasonable suspicion of drug trafficking. (R., pp. 249, 251-53.) A subsequent search of the vehicle was justified, under the automobile exception, by probable cause established because two police officers smelled an odor of marijuana emanating from the car and the alert of a drug detection dog. (R., pp. 249-50, 253-54.) After his motion to suppress was denied[1] Hunter pled guilty to trafficking in marijuana. (R., p. 250.) He thereafter moved to withdraw his plea so he could present additional evidence in support of suppression. (R., p. 250.) The district court granted the motion to withdraw the plea, but subsequently

[1] The district court did suppress some inculpatory statements Hunter made. (R., p. 250.)

denied the renewed suppression motion. (R., p. 250.) Hunter entered a conditional guilty plea to trafficking, and appealed. (R., p. 250.) The Idaho Court of Appeals affirmed. (R., pp. 248-60 (Appendix A).)

Hunter initiated the present case by filing a petition for post-conviction relief claiming ineffective assistance of counsel in pursuing his suppression motions. (R., pp. 9-20.) The district court appointed counsel to represent Hunter. (R., pp. 57, 90, 134.) The state filed an answer and a motion for summary dismissal. (R., pp. 52-55, 60-61, 241-45, 265-74.) The district court granted the state's motion, concluding that there was no evidence supporting either prong of Hunter's claims of ineffective assistance of counsel. (R., pp. 385-98 (copy attached as Appendix B).) Hunter filed a timely notice of appeal. (R., pp. 436-38.)

ISSUES

Hunter states the issues on appeal as:

I. Did the district court err when it failed to rule on and/or to provide the specific discovery prayed for in the Petitioner's application for post conviction relief; thereby abrogating Hunter's rights under both the Idaho and United States Constitutions to a full and fair hearing on the issue of suppression of evidence obtained without a warrant?

II. Whether the district court's decision to summarily dismiss the underlying petition, absent an evidentiary hearing, has denied the Appellant those due process rights promised under Article I, Sections 13 and 18 of the Idaho State Constitution, as well as those same rights guaranteed by the 5th and 14th Amendments of the United States Constitution?

III. Has the district court erred in its conclusion that Hunter did not suffer ineffective assistance of counsel at his second motion to suppress hearing sufficient to violate the Appellant's rights under the applicable portions of both the Idaho and United States constitutions?

(Appellant's brief, p. 5 (capitalization altered).)

The state rephrases the issues as:

1. Does Hunter's claim he was entitled to more discovery than was granted by the district court fail because it is neither preserved nor meritorious?

2. Has Hunter failed to show error in the district court's order summarily dismissing his petition for post-conviction relief?

ARGUMENT

I.
Hunter's Claim He Was Entitled To More Discovery Than Granted By The District Court Is Neither Preserved Nor Meritorious

A. Introduction

With his petition, prior to appointment of counsel, Hunter filed an Initial Motion for Specific Discovery, Pursuant to I.C.R. Rule [sic] 57(b), and Idaho Code(s) [sic] I.C. 19-4903 and I.C. 19-4906. (R., pp. 23-28.) Appointed counsel did not pursue this motion (see, e.g., R., p. 413), but instead filed a motion for leave to take depositions of "defense counsel and/or other relevant witnesses from the underlying criminal matter." (R., pp. 138-39.) The district court granted this discovery request. (R., pp. 141-42.)

On appeal Hunter claims the court should have granted him extensive discovery of evidence he believes both exists and would have shown that he was entitled to suppression of evidence in the criminal case. (Appellant's brief, pp. 9-13.) His claim of error fails because it was not preserved. He abandoned his initial motion for discovery and it was not ruled on. Even if this issue had been preserved Hunter has shown no error.

B. This Issue Is Not Preserved For Appeal

"This Court does not review an alleged error on appeal unless the record discloses an adverse ruling forming the basis for the assignment of error." Ada County Highway Dist. v. Total Success Invs., LLC, 145 Idaho 360, 368, 179 P.3d 323, 331 (2008). The only order regarding discovery in the record is an order granting discovery. (R., pp. 141-42.) Hunter never obtained a ruling by the

district court on his *pro se* motion, most likely because it was abandoned by counsel, who pursued a different motion for discovery that was granted by the district court. Having failed to obtain any ruling, Hunter has not preserved this issue for appellate review.

C. Even If It Had Been Preserved, The Discovery Issue Is Meritless

The "decision to authorize discovery in a post-conviction case is a matter directed to the discretion of the trial court," and that discretion is not abused unless discovery is "necessary to protect the petitioner's substantial rights." Hall v. State, 156 Idaho 125, 131, 320 P.3d 1284, 1290 (2014) (internal quotes omitted). Substantial rights are not at issue if the discovery request is "nothing more than speculation, unsupported by any evidence." Id. at 131-32, 320 P.3d at 1290-91. Post-conviction "provides a forum for known grievances, not an opportunity to research for grievances." Id. at 132, 320 P.3d at 1291.

Hunter claims he should have been allowed discovery of a wide range of items, including a tape of the traffic stop and subsequent search, evidence of "Mysty Whited's work as a police drug informant," physical evidence found in his hotel room that was testified to but not admitted as exhibits, and evidence that a GPS device had been placed in his car. (Appellant's brief, pp. 10-11.) Review of the record shows that none of this discovery is necessary to preserve Hunter's rights and either the relevance or the very existence of the evidence Hunter seeks is entirely speculative.

The district court, in the context of denying the claim counsel was ineffective for not seeking discovery of the alleged tape of his traffic stop, found

that the evidence presented showed counsel had conducted discovery seeking any tape of the stop and search, but that "none was available." (R., p. 392 (Appendix B).) Hunter's request to discover the alleged tape is not necessary to protect Hunter's rights and is based on base speculation.

In the context of ruling on Hunter's claim of ineffective assistance of counsel for not seeking discovery of a drug ledger or Whited's history as a confidential informant the district court concluded that, because the search of Hunter's car was based on probable cause arising from odors coming from the car, the physical evidence from the hotel room and Whited's credibility were not shown to be material. (R., p. 393.) In the context of discovery the state adds that Hunter's apparent belief that this evidence would have somehow supported his suppression claims is entirely speculative, and there is absolutely no connection to any claim of ineffective assistance of counsel.

As for evidence the officers used a GPS to track Hunter, there is no evidence it existed and no showing that it was relevant to the suppression motion, much less any claim of ineffective assistance of counsel.

All of the requested discovery is based on speculation that the evidence exists and speculation that, if it exists, it would have supported Hunter's suppression motion. He has failed to show that the discovery is even relevant to his claims of ineffective assistance of counsel. Even if this issue were preserved for appellate review, Hunter has failed to show that the discovery he sought was necessary to protect a substantial right or was based on anything other than an

unsupported hope that there was evidence that might support his suppression motion.

II.
Hunter Has Failed To Show Error In The District Court's Order Summarily Dismissing His Petition For Post-Conviction Relief

A. Introduction

The district court determined that Hunter had failed to make a *prima facie* showing of either deficient performance or prejudice. (R., pp. 385-97 (Appendix B).) Hunter's claim of error relies primarily upon his assertion that he should have been granted extensive discovery. (Appellant's brief, p. 13.) As shown above, this argument has no merit. Hunter also asserts that he established a *prima facie* claim of ineffective assistance regarding his renewed suppression motion. (Appellant's brief, pp. 14-15.) This argument is also without merit, as set forth below.

B. Standard Of Review

On appeal from summary dismissal of a post-conviction petition, the appellate court reviews the record to determine if a genuine issue of material fact exists, which, if resolved in the applicant's favor, would entitle the applicant to the requested relief. Matthews v. State, 122 Idaho 801, 807, 839 P.2d 1215, 1221 (1992); Aeschliman v. State, 132 Idaho 397, 403, 973 P.2d 749, 755 (Ct. App. 1999). Appellate courts freely review whether a genuine issue of material fact exists. Edwards v. Conchemco, Inc., 111 Idaho 851, 852, 727 P.2d 1279, 1280 (Ct. App. 1986).

C. The District Court Properly Concluded Hunter Had Failed To Present A *Prima Facie* Claim Of Ineffective Assistance Of Counsel

Idaho Code § 19-4906 authorizes summary dismissal of an application for post-conviction relief, in response to a party's motion or on the court's own initiative, if the applicant "has not presented evidence making a prima facie case as to each essential element of the claims upon which the applicant bears the burden of proof." Berg v. State, 131 Idaho 517, 518, 960 P.2d 738, 739 (1998). Until controverted by the state, allegations in a verified post-conviction application are, for purposes of determining whether to hold an evidentiary hearing, deemed true. Cooper v. State, 96 Idaho 542, 545, 531 P.2d 1187, 1190 (1975). However, the court is not required to accept either the applicant's mere conclusory allegations, unsupported by admissible evidence, or the applicant's conclusions of law. Ferrier v. State, 135 Idaho 797, 799, 25 P.3d 110, 112 (2001); Roman v. State, 125 Idaho 644, 647, 873 P.2d 898, 901 (Ct. App. 1994).

A post-conviction petitioner alleging ineffective assistance of counsel must demonstrate both deficient performance and resulting prejudice. Strickland v. Washington, 466 U.S. 668, 687-88 (1984); State v. Charboneau, 116 Idaho 129, 137, 774 P.2d 299, 307 (1989). Bare assertions and speculation, unsupported by specific facts, do not make out a *prima facie* case for ineffective assistance of counsel. Roman v. State, 125 Idaho 644, 649, 873 P.2d 898, 903 (Ct. App. 1994).

An attorney's performance is not constitutionally deficient unless it falls below an objective standard of reasonableness, and there is a strong presumption that counsel's conduct is within the wide range of reasonable

professional assistance. Gibson v. State, 110 Idaho 631, 634, 718 P.2d 283, 286 (1986); Davis v. State, 116 Idaho 401, 406, 775 P.2d 1243, 1248 (Ct. App. 1989). "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable ...." Strickland, 466 U.S. 668, 690 (1984). To establish prejudice, a defendant must show a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different. Aragon v. State, 114 Idaho 758, 761, 760 P.2d 1174, 1177 (1988); Cowger v. State, 132 Idaho 681, 685, 978 P.2d 241, 244 (Ct. App. 1999). Application of these legal standards to Hunter's claims leads to the conclusion that the district court properly dismissed the petition.

According to the Idaho Court of Appeals, the renewed suppression motion focused on a prior search of a motel room. (R., p. 251 (Appendix A).) The district court denied the renewed motion on the following bases: (1) "Hunter failed to establish an expectation of privacy"; (2) "the evidence gathered in the hotel search was not of particular relevance to the stop"; and (3) "the traffic violations provided an independent basis for the stop." (R., p. 251.) Hunter asserts that his counsel for the renewed suppression motion, Jim Seibe, was ineffective because he (1) "failed to call Ted Pulver, the investigator"; (2) "never investigated the drug dog used at the search scene to verify certification"; (3) "never spoke with Richard Shabazian (the state's expert on vehicle ventilation)"; (4) "never investigated the possibility of a GPS device on the vehicle"; (5) "never investigated Misty Whited"; and (6) "never made a specific request for the audio video tape." (Appellant's brief, pp. 14-15.) The district court addressed all these

claims and explained why Hunter had failed to establish a *prima facie* claim of deficient performance or prejudice. (R., pp. 392-97 (Appendix B).) The state adopts the district court's opinion as its argument on appeal.

CONCLUSION

The state respectfully requests this Court to affirm the district court's summary dismissal of Hunter's petition for post-conviction relief.

DATED this 23rd day of February, 2015.

KENNETH K. JORGENSEN
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 23rd day of February, 2015, I caused two true and correct copies of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

WYLIE GAIL HUNTER
IDOC # 88952
ISCC H Pod 216-B
PO Box 70010
Boise, ID 83707

KENNETH K. JORGENSEN
Deputy Attorney General

KKJ/pm

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 36728

STATE OF IDAHO,	)	2011 Unpublished Opinion No. 519
Plaintiff-Respondent,	)	Filed: June 16, 2011
v.	)	Stephen W. Kenyon, Clerk
WYLIE GAIL HUNTER,	)	THIS IS AN UNPUBLISHED OPINION AND SHALL NOT BE CITED AS AUTHORITY
Defendant-Appellant.	)	

Appeal from the District Court of the First Judicial District, State of Idaho, Kootenai County. Hon. Lansing L. Haynes, District Judge.

Order partially denying motion to suppress, affirmed; order denying Rule 35 motion, affirmed; judgment of conviction and sentence, affirmed.

Molly J. Huskey, State Appellate Public Defender; Sara B. Thomas, Chief Appellate Unit, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Jennifer E. Birken, Deputy Attorney General, Boise, for respondent.

GRATTON, Chief Judge

Wylie Gail Hunter appeals from the judgment of conviction entered upon his conditional guilty plea for trafficking in marijuana, Idaho Code §§ 37-2732B(a)(1)(C) and 18-204. Hunter contends that the district court erred when it denied, in part, his motion to suppress. Hunter also asserts that the district court abused its discretion by imposing an excessive sentence and denying his Idaho Criminal Rule 35 motion for reduction of sentence. We affirm.

I.

FACTS AND PROCEDURAL BACKGROUND

In 2007, Idaho State Police Detective Terry Morgan began investigating Hunter for drug smuggling. Detective Morgan had received information that Hunter would obtain a rental car, drive to the Canadian border, pick up marijuana, and return to Coeur d'Alene. Based upon this and other information, ISP began tracking Hunter's car rentals through the rental company and notified the rental company that it should contact ISP when Hunter rented a vehicle. On

September 2, 2007, an employee of the rental company contacted ISP to inform them that Hunter had rented a vehicle that morning. Detective Morgan obtained the make, model, and license plate number of the car and waited on Highway 95 at Athol for the car to drive past. At approximately 2:22 p.m., Detective Morgan saw Hunter drive by in the vehicle. Detective Morgan testified that he observed Hunter exceed the speed limit and commit two illegal lane changes. Because he was in an unmarked vehicle, Detective Morgan notified Trooper Ronald Sutton regarding the traffic infractions and advised Trooper Sutton to pull the vehicle over.

At approximately 2:38 p.m., Trooper Sutton stopped the vehicle and, after obtaining Hunter's license and registration, went around to the passenger side of the vehicle to collect the passenger's identification. While speaking with the passenger, Chase Storlie, Trooper Sutton detected a faint odor of raw marijuana coming from the vehicle, which he relayed to Detective Morgan, who had stopped behind the patrol car shortly after the stop. Hunter was removed from the vehicle and asked to sit on the front bumper of the patrol car. Detective Morgan then contacted Hunter and asked him where he was coming from and where he was going. Hunter told Detective Morgan that he had driven an old pickup from Arizona to have some service work done, that he rented a vehicle in Coeur d'Alene, picked up Storlie, and drove to Sandpoint for breakfast. Detective Morgan then approached the rental vehicle to speak with Storlie and detected an odor of marijuana. Storlie told Detective Morgan that he met Hunter at the rental car agency, and they then went to Sandpoint for breakfast. At that time, Detective Morgan noticed three boxes of heat-seal plastic bags behind the driver's seat. Detective Morgan testified that based upon his training and experience, it is common for those types of bags to be used to package marijuana. Hunter informed Detective Morgan that the heat-seal bags were in the vehicle at the time he rented the vehicle. Storlie told Detective Morgan that he and Hunter had purchased the bags that morning for Storlie's wife because she used them for canning and freezing food. Detective Morgan testified that, based upon his previous investigation, he knew that Storlie was not married. Thereafter, Trooper Sutton placed Hunter in handcuffs for "officer safety" reasons.

After observing the traffic violations, Detective Morgan also called Officer Richard Reinking in order to have a drug detection dog at the scene. At the time of the stop, Officer Reinking was involved in another criminal matter and, as such, responded to the scene approximately thirty minutes after the stop. The drug dog alerted on the trunk of the vehicle, and

the officers located two large hockey bags with approximately seventy-five pounds of marijuana inside.

Hunter was charged with trafficking in more than twenty-five pounds of marijuana. He filed a motion to suppress, claiming that the officers lacked reasonable suspicion to stop the vehicle and probable cause to search it. The district court held a hearing where it granted in part, and denied in part, Hunter's motion to suppress. Hunter pled guilty to trafficking in marijuana, and subsequently moved to withdraw his plea. The district court held a hearing on the motion to withdraw his guilty plea, granted it, and allowed Hunter to renew his motion to suppress. At a subsequent hearing held on the motion to suppress, the court ultimately concluded that it would make "no change" to its prior ruling. Hunter entered a conditional guilty plea, pleading guilty to trafficking in marijuana in an amount over twenty-five pounds, reserving his right to appeal the denial of his motion to suppress.

The district court entered a judgment of conviction and imposed a unified sentence of fifteen years, with ten years determinate. Hunter filed a Rule 35 motion for reduction of sentence, which was denied. Hunter appeals.

II.

ANALYSIS

A. Motion to Suppress

At the initial hearing on Hunter's motion to suppress, the district court found that there was reasonable and articulable suspicion to stop the vehicle, based upon several months of investigation prior to the stop, as well as due to the traffic violations observed by Detective Morgan. The court further found that when Trooper Sutton smelled the odor of marijuana coming from the vehicle, probable cause to search the vehicle was established, which was enhanced when Detective Morgan also smelled a somewhat stronger odor of marijuana coming from the vehicle. The court found that in considering whether to suppress the evidence discovered as a result of the search, the length of the detention, and the fact that Hunter was handcuffed were irrelevant. The court concluded:

> This court is finding that the marijuana that was found in the trunk of this vehicle is not the fruit of the detention. It's not the fruit of the handcuffing. It's the fruit of the probable cause that existed to search at the time that that marijuana odor was detected.

The court also determined that, for purposes of *Miranda*,[1] Hunter had been de facto arrested at the time that handcuffs were placed on him. As such, the court concluded that it would suppress Hunter's explanation to Detective Morgan regarding the mileage of the vehicle as it was given after Hunter had been handcuffed.

At the subsequent suppression hearing, Hunter challenged a search of his hotel room that Detective Morgan conducted as part of his investigation prior to the stop in this case. The district court found that Hunter had failed to establish an expectation of privacy in the hotel room at the time of the search. The court determined that the evidence gathered in the hotel search was not of particular relevance to the stop, and that the traffic violations provided an independent basis for the stop of the vehicle. The court also found the testimony of the officers to be more credible than the testimony of Hunter. The court stated that it would make no change to its prior ruling, and subsequently entered a written order stating that its previous decision on Hunter's motion to suppress "remains in effect."

On appeal, Hunter contends that the district court erred in denying his motion to suppress because the officers lacked reasonable suspicion to stop his vehicle, the officers did not have probable cause to search the vehicle to determine the amount of miles driven, and he was de facto arrested when he was placed in handcuffs and, therefore, all of the evidence obtained after that point was a fruit of that illegal arrest. The standard of review of a suppression motion is bifurcated. When a decision on a motion to suppress is challenged, we accept the trial court's findings of fact that are supported by substantial evidence, but we freely review the application of constitutional principles to the facts as found. *State v. Atkinson*, 128 Idaho 559, 561, 916 P.2d 1284, 1286 (Ct. App. 1996). At a suppression hearing, the power to assess the credibility of witnesses, resolve factual conflicts, weigh evidence, and draw factual inferences is vested in the trial court. *State v. Valdez-Molina*, 127 Idaho 102, 106, 897 P.2d 993, 997 (1995); *State v. Schevers*, 132 Idaho 786, 789, 979 P.2d 659, 662 (Ct. App. 1999).

1. **Reasonable and articulable suspicion**

Hunter acknowledges that the district court found that the officers had reasonable suspicion to stop his vehicle based upon their prior criminal investigation, as well as by

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[1] *See Miranda v. Arizona*, 384 U.S. 436 (1966).

observing traffic violations. He contends, however, that because he did not commit any traffic violations, there was no reasonable suspicion to detain him.[2]

A traffic stop by an officer constitutes a seizure of the vehicle's occupants and implicates the Fourth Amendment's prohibition against unreasonable searches and seizures. *Delaware v. Prouse*, 440 U.S. 648, 653 (1979); *State v. Atkinson*, 128 Idaho 559, 561, 916 P.2d 1284, 1286 (Ct. App. 1996). Under the Fourth Amendment, an officer may stop a vehicle to investigate possible criminal behavior if there is a reasonable and articulable suspicion that the vehicle is being driven contrary to traffic laws. *United States v. Cortez*, 449 U.S. 411, 417 (1981); *State v. Flowers*, 131 Idaho 205, 208, 953 P.2d 645, 648 (Ct. App. 1998). The reasonableness of the suspicion must be evaluated upon the totality of the circumstances at the time of the stop. *State v. Ferreira*, 133 Idaho 474, 483, 988 P.2d 700, 709 (Ct. App. 1999). The reasonable suspicion standard requires less than probable cause but more than mere speculation or instinct on the part of the officer. *Id.* An officer may draw reasonable inferences from the facts in his or her possession, and those inferences may be drawn from the officer's experience and law enforcement training. *State v. Montague*, 114 Idaho 319, 321, 756 P.2d 1083, 1085 (Ct. App. 1988). Suspicion will not be found to be justified if the conduct observed by the officer fell within the broad range of what can be described as normal driving behavior. *Atkinson*, 128 Idaho at 561, 916 P.2d at 1286.

At the hearing on Hunter's motion to withdraw his guilty plea, he testified that prior to being stopped he was driving on Highway 95 on Sunday of Labor Day weekend in "bumper to bumper" traffic the entire drive. He also testified he was driving in the slow lane approximately five miles per hour under the speed limit, because he knew what was in the trunk. He did not recall having changed lanes without signaling. The district court considered this evidence at the second hearing on the motion to suppress. The court found that the traffic violations provided a basis for the stop of Hunter's vehicle, concluding that it "continue[d] to find that there was a

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[2] Hunter does not challenge the district court's finding that the officer's prior investigation provided reasonable and articulable suspicion to stop the vehicle. As such, the Court could affirm on that basis. However, at the second hearing on the motion to suppress, the district court relied principally on the traffic violations as providing a basis for the stop. We conclude that the officers had reasonable and articulable suspicion to stop the vehicle based upon both the prior investigation, as well as the traffic violations. As the traffic violations issue was the only issue briefed, we address that issue specifically.

reasonable and articulable suspicion based upon the totality of the evidence that the Court heard to detain and stop the vehicle that Mr. Hunter was in." Indeed, Detective Morgan testified at the initial suppression hearing to having observed three traffic violations -- speeding and making two lane changes without signaling. There is substantial evidence in the record to support the district court's findings. As such, the traffic violations provided the officers with reasonable and articulable suspicion to stop Hunter's vehicle. Hunter has failed to demonstrate that the district court erred.

2. Probable cause to search the vehicle

Hunter acknowledges that the district court found that the officers could smell an odor of marijuana coming from the vehicle. Nevertheless, he maintains that the officers lacked probable cause to search his vehicle to determine the amount of miles he had driven. He contends that by reaching into the vehicle and turning the ignition key, Detective Morgan performed an illegal search and that all subsequent evidence obtained must be suppressed.

Hunter recognizes this Court's opinion in *State v. Gonzales*, 117 Idaho 518, 789 P.2d 206 (Ct. App. 1990), and characterizes it as holding that the "smell of raw marijuana could provide probable cause for officers to search a vehicle." In fact, what we held in *Gonzales* is that "[t]he smell of marijuana *alone* can satisfy the probable cause requirement for a warrantless search." *Gonzales*, 117 Idaho at 519, 789 P.2d at 207 (quoting *State v. Capps*, 641 P.2d 484, 487 (N.M. 1982) (emphasis in original)).[3] Here, Trooper Sutton and Detective Morgan both smelled the odor of raw marijuana coming from the vehicle, and that alone provided probable cause to conduct a search.

We also note that this was not the sum total of information available to the officers at the time. Detective Morgan had also been conducting an investigation of Hunter for drug smuggling for several months. He testified that he had information, which came from Storlie's ex-girlfriend, that Storlie and Hunter were smuggling marijuana across the border. She observed camouflage clothing, hiking boots, and large duffel bags. She told officers that Storlie and Hunter would rent vehicles and smuggle marijuana across the Canadian border. She also stated

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[3] *But see State v. Schmadeka*, 136 Idaho 595, 599-600, 38 P.3d 633, 637-38 (Ct. App. 2001) (recognizing a distinction between the odor of burnt marijuana and raw marijuana and holding that the odor of burnt marijuana is only sufficient to "establish probable cause for a warrantless search of the portion of the automobile associated with that odor").

that they would frequently stay at the Sandman Hotel in Canada. Detective Morgan obtained copies of receipts from the Sandman Hotel indicating that Hunter had stayed there several times. Detective Morgan also obtained several rental car receipts of vehicles rented by Hunter, and several of them indicated that the mileage put on the vehicles was approximately the distance to the Canadian border and back. Detective Morgan was also aware that Hunter was on felony probation for smuggling a large amount of cash across the border. A search of the vehicle for that offense yielded night-vision goggles, camouflage clothing, hiking boots, and a GPS unit--items which Detective Morgan referred to as a smuggler's kit. Detective Morgan also conducted a search of Hunter's hotel room, the legality of which was challenged at the second suppression hearing, and officers discovered a drug ledger.

Once the vehicle was stopped, both Trooper Sutton and Detective Morgan smelled the odor of raw marijuana. Detective Morgan also questioned Hunter and Storlie about where they were coming from and where they were going, and their stories were inconsistent. Detective Morgan also saw three boxes of heat-seal plastic bags in the vehicle, which he testified are commonly used to package marijuana. Hunter has failed to demonstrate that the district court erred in concluding that the officers had probable cause to conduct a search of the vehicle.

3. Suppression of the evidence

Hunter acknowledges that the district court found that whether he was handcuffed was irrelevant as to the suppression inquiry because the search of the trunk was a result of the probable cause established by the officers smelling raw marijuana, not a result of the handcuffing. Nevertheless, Hunter asserts that because he was de facto arrested when he was placed in handcuffs, all of the evidence obtained after that point was a fruit of an illegal arrest. We addressed a similar issue in *State v. Keene*, 144 Idaho 915, 174 P.3d 885 (Ct. App. 2007).

In *Keene*, police were dispatched to an R.V. park in response to a call from the park's host. When the officer arrived, he noticed a brown Mercury Grand Marquis with two occupants leaving the park. The park host reported that he suspected that the occupants of the car might have been selling drugs in or near the R.V. park restrooms. The following night, the same officer was dispatched to a location in response to a report of a car parked in front of an unoccupied house. When the officer arrived, he saw that it was the same car he had seen in the R.V. park the night before. The officer waited down the street and called narcotics officers for assistance. Prior to their arrival, the officer pulled his police car to the rear of the suspect

vehicle. He did not turn on his emergency lights or his flashers. A male exited the vehicle from the passenger side and told the officer that he had come to visit a relative who lived in the unoccupied house. He admitted to the officer that he had been at the R.V. park the night before. The defendant then exited the car from the driver's side and walked towards the officer. Upon questioning, the defendant gave the officer her name and date of birth. She then walked back to the car, locked the doors, and left the scene on foot. At about this time, the narcotics officers arrived and asked the investigating officer if he was "done" with the defendant, and he said that he was not. The narcotics officers ran after the defendant who resisted. The officers ultimately placed handcuffs on the defendant and took her back to the scene of the initial encounter. The officers called for a drug-detection dog, which arrived about ten minutes after the defendant had been handcuffed. The dog indicated on the car and a search revealed methamphetamine and paraphernalia. *Keene*, 144 Idaho at 917, 174 P.3d at 887.

The defendant argued on appeal that her detention became a de facto arrest when she was handcuffed, and was not supported by probable cause or reasonable suspicion that she was involved in criminal activity. *Id.* at 918, 174 P.3d at 888. We noted that there was no detention until the narcotics officers ran after the defendant and stopped her. *Id.* We then concluded:

> Assuming *arguendo* that the detention that then occurred amounted to an arrest without probable cause, this illegality would require suppression of the drugs found in the car only if there was a causal connection between the unlawful arrest and the discovery of the drugs. In *State v. McBaine*, 144 Idaho 130, 157 P.3d 1101 (Ct. App. 2007), we noted that the United States Supreme Court has instructed that suppression of evidence under the exclusionary rule is appropriate only where the challenged evidence is *in some sense*, whether direct or indirect, the product of illegal governmental activity. *See Segura v. United States*, 468 U.S. 796, 804, 815 (1984). Thus, where a defendant moves to suppress evidence allegedly gained through unconstitutional police conduct, the defendant bears an initial burden of going forward with evidence to show a factual nexus between the illegality and the state's acquisition of the evidence. *Alderman v. United States*, 394 U.S. 165, 183 (1969). "[T]he defendant need only show that, on the events that did take place, the discovery of the evidence was a product or result of the unlawful police conduct." *McBaine*, 144 Idaho at 134, 157 P.3d at 1105. Subsequently, the state bears the ultimate burden of persuasion to prove that the challenged evidence is untainted. *Id.* at 133, 157 P.3d at 1104.
>
> Here, Keene has not met her initial burden of showing a factual nexus between her detention and the discovery of drugs in her vehicle. The police did not gain any information from arresting Keene that caused them to search the vehicle, and because Keene had already walked away from the vehicle before she

> was seized, we see no way that the canine sniff and ensuing search resulted from an exploitation of the allegedly illegal arrest.

Keene, 144 Idaho at 918-19, 174 P.3d at 888-89 (emphasis in original).

In this case, as in *Keene*, Hunter has not met his initial burden of showing a factual nexus between his detention and the discovery of drugs in the vehicle. In fact, the district court specifically found that "the marijuana that was found in the trunk of this vehicle is not the fruit of the detention. It's not the fruit of the handcuffing. It's the fruit of the probable cause that existed to search at the time that that marijuana odor was detected." Hunter acknowledges the district court's findings but maintains that he was de facto arrested at the time that he was handcuffed. However, as the district court determined, whether Hunter was under de facto arrest is irrelevant to the suppression inquiry unless there is a factual nexus between the illegality and the State's acquisition of the evidence. *See Keene*, 144 Idaho at 918, 174 P.3d at 889. Hunter does not even attempt to demonstrate that there is such a factual nexus. As such, Hunter has failed to show that the district court erred, and suppression is not warranted in this case.

B. Excessive Sentence

Hunter contends that his sentence was excessive. He acknowledges that his sentence is within the statutory limits. However, he contends that it is excessive under any view of the facts. An appellate review of a sentence is based on an abuse of discretion standard. *State v. Burdett*, 134 Idaho 271, 276, 1 P.3d 299, 304 (Ct. App. 2000). Where a sentence is not illegal, the appellant has the burden to show that it is unreasonable, and thus a clear abuse of discretion. *State v. Brown*, 121 Idaho 385, 393, 825 P.2d 482, 490 (1992). A sentence may represent such an abuse of discretion if it is shown to be unreasonable upon the facts of the case. *State v. Nice*, 103 Idaho 89, 90, 645 P.2d 323, 324 (1982). A sentence of confinement is reasonable if it appears at the time of sentencing that confinement is necessary "to accomplish the primary objective of protecting society and to achieve any or all of the related goals of deterrence, rehabilitation or retribution applicable to a given case." *State v. Toohill*, 103 Idaho 565, 568, 650 P.2d 707, 710 (Ct. App. 1982). Where an appellant contends that the sentencing court imposed an excessively harsh sentence, we conduct an independent review of the record, having regard for the nature of the offense, the character of the offender, and the protection of the public interest. *State v. Reinke*, 103 Idaho 771, 772, 653 P.2d 1183, 1184 (Ct. App. 1982). When

reviewing the length of a sentence, we consider the defendant's entire sentence. *State v. Oliver*, 144 Idaho 722, 726, 170 P.3d 387, 391 (2007).

Hunter asserts that the district court abused its discretion when it failed to properly consider the mitigating factors in his case, specifically his health problems and his remorse. The court did not abuse its discretion. The court specifically noted that it must consider the four goals of sentencing and that it had considered them in this case.

With regard to Hunter's health problems, Hunter's counsel argued that while incarcerated on the charges in this case, Hunter contracted a MRSA infection at the county jail. Hunter's counsel asserted that it was "well-documented" that Hunter had suffered from MRSA for approximately sixteen months of his incarceration, which had resulted in scars on his arms, chest, and neck, and that he had ground his teeth down due to the pain. Hunter's counsel represented that he spent eight months in "the hole" in order to isolate him from other prisoners. Hunter's counsel argued that, in considering what an appropriate sentence would be, the court should consider that he be "given some credit time not just for time served but for the hard time that he served." Essentially, Hunter's counsel argued that his health problems were a mitigating factor.

In considering counsel's arguments at sentencing, the district court concluded that it was "not in a position to determine whether one person's time in the county jail is harder than another person's time." The court accepted Hunter's counsel's representations that he had a "particularly miserable time in the county jail." Nevertheless, the court proceeded to impose sentence, noting that "this was a significant drug smuggling scheme that you were involved in; seventy-five pounds of marijuana in a hockey bag. There's indications that this was not the first smuggling venture at all, that it [had] been going on for some time." The court also considered Hunter's criminal history, specifically noting that he was on federal probation for the bulk smuggling of cash and that Hunter "perform[ed] on that probation by engaging in . . . drug smuggling activities."

While Hunter also argued that he was remorseful at sentencing, the court stated:

> Your indication is that you take the marijuana to Arizona. In the PSI you say you're selling it to help people, and you're selling it for medical marijuana use. It's strange credibility to think that you are disposing of hundreds of pounds of marijuana out of the benevolence of your heart to assist people with aches and pains. The Court rejects that as incredible and unbelievable. The Court rather makes the reasonable inference that you were a drug smuggler for the profit of it.

The court further found:

> When counsel for the State describes you as thinking with clarity, I don't think they're referring to your ability to drive a car or to negotiate your route. I think they're referring to the fact that this was a well-planned out scheme. This was certainly you were caught in the long run. This is not a mistake. This is not clouded thinking at all. This was the cognizant decision to profit from illegal smuggling of a controlled substance into our country. And whether it was being distributed in Arizona or Idaho makes no difference to the Court. What you were doing was bringing product into the country that may or may not be able to help certain individuals but without doubt destroyed many, many, many more lives than it at all helps at all.

The court was clearly aware of Hunter's arguments. Nevertheless, the court rejected those arguments in an exercise of its discretion. The court found Hunter's explanation for his activities unbelievable and, while not explicitly referencing Hunter's expression of remorse, determined that he was a "drug smuggler for the profit of it." The district court appropriately considered the goals of sentencing, and we conclude, having reviewed the record in this case, that Hunter has failed to demonstrate that the court abused its discretion.

C. Rule 35

Hunter also argues that the district court abused its discretion in denying his Rule 35 motion. A motion for reduction of sentence under I.C.R. 35 is essentially a plea for leniency, addressed to the sound discretion of the court. *State v. Knighton*, 143 Idaho 318, 319, 144 P.3d 23, 24 (2006); *State v. Allbee*, 115 Idaho 845, 846, 771 P.2d 66, 67 (Ct. App. 1989). In presenting a Rule 35 motion, the defendant must show that the sentence is excessive in light of new or additional information subsequently provided to the district court in support of the motion. *State v. Huffman*, 144 Idaho 201, 203, 159 P.3d 838, 840 (2007). An appeal from the denial of a Rule 35 motion cannot be used as a vehicle to review the underlying sentence absent the presentation of new information. *Id.*

Hunter argues that the district court abused its discretion in denying his Rule 35 motion because his sentence is excessive in light of the "new or additional" information regarding his health problems. This contention, however, is belied by the record. None of the information presented in the Rule 35 motion was new or additional information. All of the information regarding Hunter's MRSA infection that was submitted on the Rule 35 motion was previously

submitted at sentencing. While the arguments varied slightly, the information before the district court was the same.

Hunter also argues that the district court abused its discretion in denying his Rule 35 motion because it failed to consider his corrections and clarifications made at sentencing regarding one of his prior charges, and then referred to that prior charge in denying his Rule 35 motion. At the hearing on the Rule 35 motion, the district court simply stated that "Mr. Hunter admitted that he seriously defrauded an insurance company." The presentence investigation report indicated that Hunter self-reported a charge in Washington for conspiracy to collect insurance. The PSI stated that Hunter stated that he was working at a used car dealership and when "business went bad" he billed his insurance to obtain money. At sentencing, Hunter's counsel referred to this charge stating:

> On Page 3--um--there's this prior record that's self-reported. . . . But from what I understand my client actually owned a new Chrysler dealership. And at the time had some involvement with someone when the business was going badly was trying to or asking him if they wanted him to burn the place down. I don't know whatever happened to that. It's kind of interesting that that was self-reported. And there's nothing on the reports or from what I can see in the NCIC or whatever the presentence people ran. I guess from my perspective that doesn't really reflect much on this particular situation. The reporting itself was interesting because my client did own the dealership. And it was a new car dealership instead of being working at a used car dealership as was mentioned in the presentence investigation report.

Based upon the record, while there may have been some discrepancies, the court was concerned about the fact that Hunter defrauded an insurance company, a charge which he self-reported. The court's reference to this charge does not indicate that it failed to consider any corrections to the PSI.

At the hearing on the Rule 35 motion, the district court reiterated its reasoning for imposing the sentence:

> Because I considered the factor that Mr. Hunter had 75 pounds of marijuana smuggled back into this country in a hockey bag after what appeared to have been evidence of some repeated trips to Canada and back for the same purposes. I also took into consideration the fact that Mr. Hunter had a 1987 or a 1988 incident that was a conspiracy to maliciously injure property. Mr. Hunter admitted that he seriously defrauded an insurance company in 1988. It appeared Mr. Hunter did a nine-month federal prison sentence in '87 or '88. There was a 1993 misdemeanor malicious injury to property. And a 2004 felony of a full cash

> smuggling that had a four-month prison sentence in which Mr. Hunter was on probation at the time of the commission of this offense.
>
> So when the Court looks at the mandatory minimum, the fixed minimum of five years and the maximum in the matter of 15 years, the Court determined that to give Mr. Hunter the relief that he requests would be simply to diminish the seriousness of *this crime*. Mr. Hunter would essentially be getting the same sentence that the gentleman that came before the Court with no prior criminal history would get, that being the five-year fixed minimum as opposed to getting it adjusted.

(Emphasis added.) While the court did consider the fact that Hunter had a prior criminal history, the record demonstrates that the court was particularly concerned about Hunter's actions in the instant case. Based upon the nature of the offense and Hunter's prior criminal history, the court concluded that a unified sentence of fifteen years, with ten years determinate, was the most appropriate. We conclude that Hunter has failed to demonstrate that the district court abused its discretion in denying his Rule 35 motion.

III.

CONCLUSION

The district court did not err in partially denying Hunter's motion to suppress. The district court did not abuse its discretion in sentencing Hunter or in denying his I.C.R. 35 motion for reduction of sentence. Accordingly, Hunter's judgment of conviction and sentence are affirmed.

Judge LANSING and Judge MELANSON CONCUR.

APPENDIX B

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

WYLIE HUNTER, Petitioner, v. STATE OF IDAHO, Respondent.	**CASE NO.** CV 2012-4908 **MEMORANDUM OPINION AND ORDER ON STATE'S MOTION FOR SUMMARY DISPOSITION**

This matter came on before the Court on Petitioner's Amended Petition for Post-Conviction Relief filed on July 20, 2012. The Petitioner was represented by Michael Palmer, of the firm Anderson Palmer George & Walsh. The State was represented by Bryant Bushling, Kootenai County Deputy Prosecuting Attorney. Oral argument was heard telephonically on the matter on January 28, 2014. The Court, being fully advised in the matter, hereby renders its decision.

BACKGROUND

In the underlying criminal matter, the Petitioner entered into a conditional plea of guilty to the charge of trafficking in marijuana in an amount over twenty-five pounds,

reserving his right to appeal the trial court's denial of a motion to suppress. The Court of Appeals heard the Petitioner's appeal on this matter, and affirmed the trial court's order on the motion to suppress. *See State v. Hunter*, 2011 Unpublished Opinion No. 519, Docket No. 36728 (Ct. App. 2011).[1] The Petitioner was sentenced to a unified sentence of fifteen years, with ten years determinate. On June 5, 2012, the Petitioner filed a Petition and Affidavit for Post-Conviction Relief and subsequently an amended petition was filed on July 20, 2012.

A comprehensive factual history of the underlying criminal case is set forth in the Court of Appeals unpublished opinion regarding the motion to suppress. In 2007, the Idaho State Police began investigating Hunter for drug smuggling. On September 2, 2007, Hunter's vehicle was stopped near Athol, Idaho. Detective Morgan of the Idaho State Police testified he observed the vehicle exceed the speed limit and commit two illegal lane changes.

The ISP trooper that stopped the vehicle testified he could detect a faint odor of raw marijuana coming from the vehicle. Detective Morgan also approached the vehicle and detected the odor of marijuana, and he also observed three boxes of heat-seal plastic bags behind the driver's seat. Detective Morgan called Officer Richard Reinking to respond to the scene with a drug detection dog. Officer Reinking arrived thirty minutes later, and when the drug dog was deployed, it alerted on the trunk of the vehicle. After the alert, the officers opened the trunk and located two large hockey bags with approximately seventy-five pounds of marijuana inside.

[1] This Court takes judicial notice of the pleadings and evidentiary record of Kootenai County Case No. CRF 07-20448, including the unpublished opinion of the Idaho Court of Appeals which affirmed the district court's ruling on the Petitioner's motions to suppress in the underlying criminal matter.

At the initial hearing on the motion to suppress, the district court found there was reasonable and articulable suspicion to stop the vehicle based upon several months of investigation prior to the stop, as well as due to the observed traffic violations. Once the trooper smelled the odor of marijuana coming from the vehicle, probable cause to search the vehicle was established. At a subsequent suppression hearing, Hunter challenged a search of a hotel room that occurred prior to the stop. The district court determined that Hunter failed to establish an expectation of privacy in the hotel room at the time of the search. The Court of Appeals held that the district court did not err in denying Hunter's motions to suppress.

The Petitioner alleges ineffective assistance of counsel with respect to trial counsel's representation with respect to the motions to suppress. These claims include failure to procure discovery, failure to challenge witnesses, failure to call witnesses who would have provided favorable testimony, and failure to determine whether the drug dog was properly certified. The Petitioner has provided deposition transcripts of counsel and investigators in support of his petition.

POST-CONVICTION RELIEF STANDARD

Under the Uniform Post-Conviction Procedure Act, a person sentenced for a crime may seek relief upon making one of the following claims:

> (1) That the conviction or the sentence was in violation of the constitution of the United States or the constitution or laws of this state;
> (2) That the court was without jurisdiction to impose sentence;
> (3) That the sentence exceeds the maximum authorized by law;
> (4) That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
> (5) That his sentence has expired, his probation, or conditional release was unlawfully revoked by the court in which he was convicted, or that he is otherwise unlawfully held in custody or other restraint;

> (6) Subject to the provisions of section 19-4902(b) through (f), Idaho Code, that the petitioner is innocent of the offense; or
> (7) That the conviction or sentence is otherwise subject to collateral attack upon any ground or alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding, or remedy.

I.C. § 19-4901(a).

A petition for post conviction relief "may be filed at any time within one (1) year from the expiration of the time for appeal or from the determination of an appeal or from the determination of a proceeding following an appeal, whichever is later." I.C. § 19-4902(a).

Petitions for post-conviction relief are a special proceeding distinct from the criminal action that led to the petitioner's conviction. *Sanchez v. State*, 127 Idaho 709, 711, 905 P.2d 642, 644 (Ct. App. 1995). "An application for post-conviction relief initiates a proceeding which is civil in nature." *Fenstermaker v. State*, 128 Idaho 285, 287, 912 P.2d 653, 655 (Ct. App. 1995). However, unlike an ordinary civil action that requires only a short and plain statement of the claim, an application for post-conviction relief "must be verified with respect to facts within the personal knowledge of the applicant, and affidavits, records or other evidence supporting its allegations must be attached, or the application must state why such supporting evidence is not included with the petition. I.C. § 19-4903." *Id.*

A petitioner in an application for post-conviction relief bears the burden of pleading and proof imposed upon a civil plaintiff. "Thus, an applicant must allege, and then prove by a preponderance of the evidence, the facts necessary to establish his claim for relief." *Martinez v. State*, 125 Idaho 844, 846, 875 P.2d 941 (Ct. App. 1994).

Under I.C. § 19-4906, summary disposition of a petition for post-conviction relief may occur upon motion of a party or upon the court's own initiative. However, "[s]ummary dismissal is permissible only when the applicant's evidence has raised no genuine issue of material fact which, if resolved in the applicant's favor, would entitle the petitioner to the requested relief." *Fenstermaker*, 128 Idaho at 287, 912 P.2d at 655.

"If the application raises material issues of fact, the district court must conduct an evidentiary hearing and make specific findings of fact on each issue." *Sanchez*, 127 Idaho at 711, 905 P.2d at 644. "It is also the rule that a conclusory allegation, unsubstantiated by any fact, is insufficient to entitle a petitioner to an evidentiary hearing." *Baruth v. Gardner*, 110 Idaho 156, 159, 715 P.2d 369, 372 (Ct. App. 1986).

ANALYSIS

The Petitioner's claims of ineffective assistance of counsel can be broadly categorized into two areas: ineffective assistance in preparing for the motions to suppress which were presented to the court; and ineffective assistance of counsel by failing to present witnesses at the suppression hearings.

In *Schoger v. State*, 148 Idaho 622, 226 P.3d 1269 (2010), the Idaho Supreme Court sets forth the requirements a petitioner must meet in order to survive summary dismissal of an ineffective assistance of counsel claim.

> For an application for post-conviction relief based on a claim of ineffective assistance of counsel to survive summary dismissal, the petitioner must establish that: (1) a material issue of fact exists as to whether counsel's performance was deficient; and (2) a material issue of fact exists as to whether the deficiency prejudiced the claimant's case. *Strickland v. Washington*, 466 U.S. 668, 687–88, 104 S.Ct. 2052, 2064–65, 80 L.Ed.2d 674, 693–94 (1984); *Baldwin v. State*, 145 Idaho 148, 153, 177 P.3d 362, 367 (2008). To establish deficient assistance, the claimant has the burden of showing that her attorney's conduct fell below an objective standard of reasonableness. *Baldwin*, 145 Idaho at 153, 177 P.3d

> at 367. This objective standard embraces a strong presumption that the claimant's counsel was competent and diligent. *Id.* More simply put, "the standard for evaluating attorney performance is objective reasonableness under prevailing professional norms." *State v. Mathews,* 133 Idaho 300, 306, 986 P.2d 323, 329 (1999). Additionally, to establish prejudice, the claimant must show a reasonable probability that but for her attorney's deficient performance the outcome of the proceeding would have been different. *Baldwin,* 145 Idaho at 153, 177 P.3d at 367.

Schoger v. State, 148 Idaho 622, 624-625, 226 P.3d 1269, 1271-1272 (2010).

Summary dismissal is appropriate where evidentiary facts are not disputed, despite the possibility of conflicting inferences which may be drawn from the facts.

> Idaho Code § 19–4906 authorizes summary dismissal of an application for post-conviction relief, either pursuant to motion of a party or upon the court's own initiative. Summary dismissal of an application is the procedural equivalent of summary judgment under Idaho Rule of Civil Procedure 56. "A claim for post-conviction relief will be subject to summary dismissal ... if the applicant has not presented evidence making a prima facie case as to each essential element of the claims upon which the applicant bears the burden of proof." *DeRushé v. State,* 146 Idaho 599, 603, 200 P.3d 1148, 1152 (2009) (quoting *Berg v. State,* 131 Idaho 517, 518, 960 P.2d 738, 739 (1998)). If there exists a genuine issue of material fact that, if resolved in the applicant's favor, would entitle the applicant to the requested relief, an evidentiary hearing must be conducted. *State v. Payne,* 146 Idaho 548, 561, 199 P.3d 123, 136 (2008); *Goodwin v. State,* 138 Idaho 269, 272, 61 P.3d 626, 629 (Ct.App.2002). As the trial court rather than a jury will be the trier of fact in the event of an evidentiary hearing, summary dismissal is appropriate where the evidentiary facts are not disputed, despite the possibility of conflicting inferences to be drawn from the facts, for the court alone will be responsible for resolving the conflict between those inferences. *State v. Yakovac,* 145 Idaho 437, 444, 180 P.3d 476, 483 (2008); *Hayes v. State,* 146 Idaho 353, 355, 195 P.3d 712, 714 (Ct.App.2008). That is, the judge in a post-conviction action is not constrained to draw inferences in favor of the party opposing the motion for summary disposition, but rather is free to arrive at the most probable inferences to be drawn from uncontroverted evidentiary facts. *Hayes,* 146 Idaho at 355, 195 P.3d at 714.

Zepeda v. State, 152 Idaho 710, 713, 274 P.3d 11, 14 (Ct. App. 2012).

In the case at hand, the Petitioner has provided deposition testimony of the four attorneys who represented him in court, and deposition testimony of two investigators.

This case is similar to *Zepeda*, where the trial court is free to arrive at the most probable inferences to be drawn from the uncontroverted evidentiary facts. In this case, it is not disputed that the key to effectively defending the case was to successfully challenge the police search and seizure of evidence stemming from a highway traffic stop and subsequent roadside search of the Petitioner's vehicle.[2]

1. **Claims that counsel was ineffective for failing to adequately prepare for the motion to suppress.**

The Petitioner's claim of ineffective assistance of counsel is narrowed to eleven specific claims within the amended petition. Several of these claims fall under a broad category of whether counsel's pretrial preparation fell below a level of reasonable performance. This issue was discussed in *Thomas v. State*, 145 Idaho 765, 185 P.3d 921 (Ct. App. 2008).

> Determining whether an attorney's pretrial preparation falls below a level of reasonable performance constitutes a question of law, but is essentially premised upon the circumstances surrounding the attorney's investigation. *Gee v. State,* 117 Idaho 107, 110, 785 P.2d 671, 674 (Ct.App.1990). To prevail on a claim that counsel's performance was deficient in failing to interview witnesses, a defendant must establish that the inadequacies complained of would have made a difference in the outcome. *Id.* at 111, 785 P.2d at 675. It is not sufficient merely to allege that counsel may have discovered a weakness in the state's case. *Id.* We will not second-guess trial counsel in the particularities of trial preparation. *Id.*
>
> In this case, Thomas asserts that he received ineffective assistance of counsel because his trial attorney failed to investigate the escort's motivation for testifying against him and failed to aggressively cross-examine the escort.
>
> . . .
>
> Thomas generally argues that his trial attorney was ineffective for failing to spend more time on his case and failing to do as Thomas requested in his letters. For example, Thomas argues that his attorney was

[2] *See* Deposition of Douglas D. Phelps, at 9-10; Deposition of Peter C. Jones, at 6-11; Deposition of John E. Redal, at 7; Deposition of James E. Siebe, at 9-10.

> ineffective for failing to provide the discovery that Thomas requested-the taped confession Thomas made to the escort. Thomas alleges that, had this discovery been provided the outcome of his trial may have been different. Thomas cannot demonstrate and fails to allege how spending more time on his case generally or doing specific tasks like sending him the discovery would have had led to a different outcome at trial.
>
> "The constitutional requirement for effective assistance of counsel is not the key to the prison for a defendant who can dredge up a long series of examples of how the case might have been tried better." *Ivey v. State*, 123 Idaho 77, 80, 844 P.2d 706, 709 (1992). We conclude that the district court was correct in dismissing Thomas's claim of ineffective assistance of counsel based on his attorney's failure to adequately prepare for trial because Thomas has failed to allege or demonstrate any prejudice caused by this deficiency.

Id. at 769-770, 185 P.3d at 925-926.

In the case at hand, several of Hunter's claims deal with pretrial preparation. First, Hunter alleges that not all relevant discovery was provided in the criminal case. Hunter fails to provide admissible evidence that discovery was withheld in this case. Attorney Siebe, who last represented Hunter in the criminal matter, testified that he attempted to locate a video of the stop, but none was available. *Deposition of James E. Siebe*, at 10. Further, there was testimony regarding Rule 16 requests for evidence from the State. *Id.* at 12.[3] Even if Hunter were able to establish that not all relevant discovery was provided in the case, he would then be required to show this inadequacy would have changed the outcome of the case. *Thompson*, 145 Idaho at 769, 185 P.3d at 926. Hunter cannot show prejudice without first showing that the relevant discovery was withheld. If a petitioner fails to present evidence to establish an essential element on which he bears the burden of proof, summary dismissal is appropriate. *Mata v. State*, 124 Idaho 588, 592, 861 P.2d 1253, 1257 (Ct. App. 1993).

[3] Douglas Phelps testified it was the normal practice of his office to seek evidence of video of stops, and that he would repeatedly ask for such evidence or file a motion to compel if necessary. *Deposition of Douglas D. Phelps*, at 17.

Second, Hunter claims a "drug ledger" that the police had supposedly located in a search of a hotel room was not provided in discovery. As noted above, the underlying criminal case against Hunter arose from the police search and seizure of evidence during a highway traffic stop and subsequent roadside search of the Petitioner's vehicle. Thus, even if the "drug ledger" in question had been provided in discovery, the Petitioner fails to establish a material issue of fact regarding how this evidence would have changed the outcome of his case. The claim is at best speculative. Because the Petitioner has not presented any evidence on this claim, summary dismissal is appropriate. *See Mata*, 124 Idaho at 592, 861 P.2d at 1257.

Hunter also asserts that counsel was ineffective for failing to find evidence that witness Misty Whited committed perjury, had two social security numbers, and was working as a confidential informant for Detective Morgan. First, the record is devoid of evidence that Ms. Whited was operating in this capacity. Second, even if Whited was a confidential informant, this evidence would have no basis on the issue before the Court at the motion to suppress—whether the officers had probable cause to stop and subsequently search the vehicle. The Petitioner has not presented any evidence on this claim, thus, summary dismissal is appropriate. *See Mata*, 124 Idaho at 592, 861 P.2d at 1257.

Hunter claims that counsel was ineffective because none of the attorneys sought evidence to show that the drug dog "Griz" was not certified.[4] First, Hunter has no

[4] Attorney Phelps testified that the issue of whether Griz was a certified drug dog was a side issue, or less material, because the officer's established probable cause when they noticed the odor of marijuana coming from the car. *Deposition of Douglas D. Phelps*, at 31-33. Attorney Jones testified it was generally the practice of the office to figure out if a dog was certified and that the certification was up to date. *Deposition of Peter C. Jones*, at 17-18. Attorney Redal testified regarding his general practice regarding cases with drug dogs. *Deposition of John E. Redal*, at 25-26. Attorney Siebe testified that it was not

evidence which shows that at the time of the stop, the drug dog was not certified. Even if Hunter could show that the dog was not certified, Hunter cannot meet the requirement of showing that this evidence would have affected the outcome of the case. Judge Haynes determined that once the vehicle was stopped, both Trooper Sutton and Detective Morgan smelled the odor of raw marijuana, and Detective Morgan saw three boxes of heat seal plastic bags in the vehicle. *See State v. Hunter*, 2011 Unpublished Opinion No. 519, Docket No. 36728, at 7 (Ct. App. 2011). Ultimately, because Hunter cannot show how evidence relating to the certification of the drug dog would have affected the outcome of the motion to suppress, this issue is appropriately summarily dismissed. *Thomas v. State*, 145 Idaho 765, 185 P.3d 921 (Ct. App. 2008).

Next Hunter alleges counsel failed to procure employment records for an expert witness for the State, Mr. Shabazian, in an effort to discredit his expert testimony regarding the ventilation system of the vehicle Hunter was driving at the time of the arrest. Similar to the issues above, Hunter fails to provide evidence that shows Shabazian's employment records would discredit his testimony as an expert witness. Also, an affidavit of a defense expert, Gabe Wilkins, was also presented to the court for consideration. Ultimately, there is nothing in the record which shows that if counsel had been able to procure Shabazian's employment records, the outcome of the case would have been different. Therefore, this claim is summarily dismissed.

Hunter alleges counsel was ineffective because they failed to address whether GPS tracking devices were used on Hunter's vehicle.[5] Hunter has provided no evidence

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necessary to find out about the dog's certification because Officers Sutton and Morgan both testified they could smell the odor of raw marijuana in the vehicle. *Deposition of James E. Siebe*, at 21-22.

[5] Attorney Phelps testified that there was no indication GPS was used on the car. *Deposition of Douglas D. Phelps*, at 33. Attorney Jones testified that he believed officers were watching for the car based upon a

in the record to show that his vehicle was being tracked with a GPS device. Further, Hunter provides no evidence to show that had counsel been aware of this evidence, the outcome of the case would have changed. The trial court determined that the officer had probable cause to stop the vehicle based upon the traffic violations, and subsequently, the search was upheld based upon a totality of the circumstances with respect to the officers' observations. Thus, because Hunter cannot show that evidence of GPS use would have changed the outcome of the case, this issue is summarily dismissed.

Hunter asserts counsel was ineffective for failing to interview co-defendant Chase Storlie in preparation for presentation on the motion to suppress. Three of the four attorneys who represented Hunter testified regarding their strategic planning regarding the testimony presented at the hearing. Each stated that it would be unusual to present a co-defendant in such a hearing, due to Fifth Amendment and ethical issues.[6] The testimony from the attorneys establishes that it was a tactical, or strategic decision to not present Storlie as a witness. "[T]actical or strategic decisions of trial counsel will not be second-guessed on appeal unless those decisions are based on inadequate preparation, ignorance of relevant law or other shortcomings capable of objective evaluation." *Booth v. State*, 151 Idaho 612, 618, 262 P.3d 255, 261(2011), *citing Howard v. State,* 126 Idaho 231, 234, 880 P.2d 261, 264 (Ct. App. 1994). Therefore, Hunter's claim that counsel was ineffective for not questioning Storlie, or not presenting Storlie as a witness, is summarily dismissed.

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description of the vehicle obtained from Avis, that there was no indication of GPS use. *Deposition of Peter C. Jones*, at 18-19. Attorney Redal testified he did not recall specifically in this case there being any GPS issues. *Deposition of John E. Redal*, at 27. Attorney Siebe testified he did not believe GPS was an issue in this case. *Deposition of James E. Siebe*, at 22.

[6] *See Deposition of Douglas D. Phelps*, at 34-37; *Deposition of Peter C. Jones*, at 19-21; *Deposition of John E. Redal*, at 30-33.

Finally, Hunter asserts counsel was ineffective in preparing for trial because none of the attorneys traveled to the location where the stop occurred in order to challenge Detective Morgan's testimony regarding the traffic violations he observed. At deposition, counsel testified regarding either having an investigator look at the scene of the stop, or that counsel was familiar with the roadway in that area.[7] Hunter fails to provide evidence that had the attorneys visited the location of the stop, evidence would have been gathered which would have changed the outcome of the case. Detective Morgan was subjected to cross-examination regarding the stop at the motion to suppress hearing. With no evidence to show the outcome of the case would have been different, this issue is summarily dismissed.

2. Claims that counsel was ineffective for failing to present witnesses at the motion to suppress hearing.

Hunter also asserts counsel was ineffective for failing to present the testimony of three witnesses. Hunter asserts Ted Pulver would have provided favorable testimony, Frank Gabriel would have provided favorable testimony and finally that Rhonda Spencer would have contradicted Detective Morgan regarding testimony that he had contacted Spencer in her capacity as Hunter's probation officer, prior to the traffic stop and arrest.

The determination of which witnesses to call is a strategic or tactical decision made by counsel.

> In evaluating an ineffective assistance claim, there is a strong presumption that counsel's performance was within the wide range of reasonable

[7] Attorney Phelps testified that he could not recall whether he had his investigator review the circumstances of the stop. *Deposition of Douglas D. Phelps*, at 42-43. Attorney Jones stated that he did not need to see the scene in this case because the question was whether there was probable cause before the stop and whether or not the drug dog took too long. *Deposition of Peter C. Jones*, at 25-27. Attorney Redal testified that because he lives in Coeur d'Alene, he is familiar with the stretch of roadway. *Deposition of John E. Redal*, at 33-36. Attorney Siebe also testified regarding his familiarity with that stretch of roadway. *Deposition of James E. Siebe*, at 10-11.

> professional assistance as "sound trial strategy." *Russell v. State,* 118 Idaho 65, 67, 794 P.2d 654, 656 (Ct.App.1990). Strategic or tactical decisions made by trial counsel will not be second-guessed on review, unless those decisions were made upon a basis of inadequate preparation, ignorance of the relevant law, or other shortcomings capable of objective evaluation. *Id.* Trial counsel's decision of which witnesses to call is encompassed in that aspect of trial counsel's role denominated "trial tactics" or "strategic choices." *State v. Larkin,* 102 Idaho 231, 234, 628 P.2d 1065, 1068 (1981).

Campbell v. State, 130 Idaho 546, 548, 944 P.2d 143, 145 (Ct. App. 1997). *See also Murphy v. State*, 143 Idaho 139, 139 P.3d 741 (Ct. App. 2006).

In the case at hand, counsel made the tactical decision to not call Ted Pulver, Frank Gabriel, or Rhonda Spencer. While the Petitioner has asserted that these witnesses would have either provided favorable testimony, or in the case of Spencer, testimony that may have impeached Detective Morgan, the Petitioner fails to establish how the testimony would have changed the outcome of the case. "It is not sufficient merely to allege that counsel may have discovered a weakness in the state's case. *Id.* We will not second-guess trial counsel in the particularities of trial preparation." *Thomas v. State*, 145 Idaho 765, 769, 185 P.3d 921, 925 (Ct. App. 2008). Thus, these three claims are summarily dismissed.

CONCLUSION

Based upon the foregoing analysis, the State's Motion for Summary Disposition is granted.

ORDER

The State's Motion for Summary Disposition is hereby GRANTED.

IT IS SO ORDERED.

DATED this 26th day of February 2014.

CARL B. KERRICK – District Judge

CERTIFICATE OF MAILING

I hereby certify that a true copy of the foregoing ORDER ON STATE'S MOTION FOR SUMMARY DISPOSITION was:

_____ hand delivered via court basket, or

_____ mailed, postage prepaid, by the undersigned at Lewiston, Idaho, this 26th day of February, 2014, to:

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PATTY O. WEEKS, CLERK

By: _____
Deputy

CLERK OF DISTRICT COURT SECOND JUDICIAL DISTRICT KOOTENAI COUNTY EX-OFFICIO AUDITOR AND RECORDER STATE OF IDAHO